(1) Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ALVIN L. KENDALL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was Petitioner's right to due process violated when the district court found by a preponderance of the evidence that no drugs could be attributable to the Petitioner for sentencing, but allowed the petitioner's conviction of conspiracy to distribute cocaine to stand?

2. Federal Rules of Criminal Procedure 32(a) provides for sentencing a convicted defendant without unnecessary delay. The government's chief witness against Petitioner, Sam Carroll, was sentenced almost 19 months after he pled guilty. Carroll also pled guilty 12 months before testifying in Petitioner's trial. Was Petitioner's due process right and his right to a fair trial violated when the government's theory of the case and the evidence at Carroll's sentencing, materially differed from their trial testimony in Petitioner's case? Federal Rules of Criminal Procedure 32(a) provides for sentencing a convicted defendant without unnecessary delay.

3. Were Defendant's 5th and 6th Amendment Rights violated when the Court charged and allowed a copy of the jury charges into the jury room that stated that Count III was conspiracy to "knowingly possess cocaine with intent to distribute" rather than the conspiracy to "knowingly and intentionally distribute cocaine" as stated in the indictment?

4. Should Defendant's base offense level, when the Defendant is convicted of the underlying crime, be

determined by Defendant's relevant conduct, or, the other participant's relevant conduct, when applying U.S.S.G. Section 2J1.2(c)'s cross reference to U.S.S.G. Section 2X3.1, Accessory After the Fact?

PARTIES TO THE PROCEEDING

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2. Federal Rules of Criminal Procedure 32(a) provides for sentencing a convicted defendant without unnecessary delay. The government's chief witness against Petitioner, Sam Carroll, was sentenced almost 19 months after he pled guilty. Carroll also pled

guilty 12 months before testifying in Petitioner's trial. Petitioner's due process right and his right to a fair trial was violated when the government's theory of the case and the evidence at Carroll's sentencing, materially differed from their trial testimony in Petitioner's case. Federal Rules of Criminal Procedure 32(a) provides for sentencing a convicted defendant without unnecessary delay.

3. Defendant's 5th and 6th Amendment Rights were violated when the Court charged and allowed a copy of the jury charges into the jury room that stated that Count III was conspiracy to "knowingly possess cocaine with intent to distribute" rather than the conspiracy to "knowingly and intentionally distribute cocaine" as stated in the indictment.

4. Clarification is needed as to whether Defendant's base offense level, when the Defendant is convicted of the underlying crime, should be determined by Defendant's relevant conduct, or, the other participant's relevant conduct, when applying U.S.S.G. Section 2J1.2(c)'s cross reference to U.S.S.G. Section 2X3.1, Accessory After the Fact.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Alvin L. Kendall, respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United Sates Court of Appeals for the Eleventh Circuit entered in this proceeding on November 23, 1999.

OPINIONS BELOW

The Opinion of the Eleventh Circuit Court of Appeals (App. 1) is not reported.

JURISDICTION

The Court of Appeals entered its judgment on November 23, 1999. Its order denying Petitioner Kendall's Petition For Rehearing (App. 5) was issued on February 18, 2000.

The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The District Court had original jurisdiction of this case pursuant to 18 U.S.C. Section 3231. The 11th Circuit Court of Appeals had jurisdiction of this case pursuant to 28 U.S.C. Section 1291 and 18 U.S.C. Section 3742(a)(1).

Alvin L. Kendall, Petitioner, was indicted on September 3, 1997, for conspiracy to violate 18 U.S.C. § 2232(b) under 18 U.S.C. 371, in Count I; a violation of 18 U.S.C. § 2232(b) in Count II; and conspiracy to distribute cocaine in violation of 21 U.S.C. § 846 and 841 in Count Three. Regina Bledsoe ("Bledsoe"), a Drug Enforcement Administration Special Agent, was also indicted in Counts One, Two and Three.

A trial by jury began on February 17, 1998, and was completed on March 13, 1998. A verdict of guilty was returned against Petitioner on Counts I and III, with Petitioner having been acquitted on Count II. Bledsoe was acquitted on all counts of the indictment. Petitioner moved for a judgment of acquittal at the end of the government's case, at the end of Defendant's case, and post-trial. The District Court denied all motions for judgment of acquittal. Petitioner moved for a new trial, which was also denied by the District Court.

Petitioner was originally scheduled to be sentenced on June 15, 1998. On the District Court's motion, the Petitioner's sentencing was continued until December 3, 1998. The District Court sentenced Petitioner to the statutory maximum of sixty (60) months in prison on Count One and twelve (12) months in prison, to run concurrent with Count I, as to Count III. A timely notice of appeal was filed on December 10, 1998.

Petitioner was incarcerated on March 20, 1998, pursuant to a motion made by the Government, and remained incarcerated until the District Court granted Petitioner an appeal bond on January 15, 1999. Petitioner's appeal was denied by the 11th Circuit Court of Appeals on November 23, 1999. Petitioner's Petition for Rehearing and Rehearing En Banc was denied on February 18, 2000. Petitioner was remanded to federal prison on December 16, 1999.

Petitioner, a practicing attorney, met DEA Special Agent (SA), Regina Bledsoe, during a criminal trial in 1989. Petitioner represented one of the defendants in the case in which Bledsoe was the case agent prosecuting the case. After the trial was over in 1990, Petitioner and Bledsoe became friends.

The genesis of Petitioner's case was a narcotics investigation of convicted felon Sam Carroll in the Atlanta area. In 1996, Petitioner was engaged to represent an individual by the name of Chris McCreary in a drug conspiracy case in the Atlanta Division of the Northern District of Georgia. Petitioner tried the case to a jury before the Honorable Clarence Cooper, United States District Court Judge for the Northern District of Georgia. McCreary's first trial ended in a hung jury. The second trial ended in the conviction of McCreary.

McCreary, unhappy with his conviction, suggested to the government that he wished to cooperate in the prosecution of other individuals, namely Carroll. McCreary, between the end of his second trial and his sentencing, obtained new counsel, without notice to Petitioner. McCreary and/or his new counsel, approached the

government about cooperating. The same Assistant U.S. Attorney that prosecuted McCreary, Carroll and Petitioner, facilitated this change of counsel without the knowledge of Petitioner nor Judge Cooper, the judge that tried both McCreary cases. On or about January 29, 1997, Carroll was arrested on a multi-count drug indictment. Carroll was denied bond for several reasons, including his violent past and the fact that he was facing at least a term of imprisonment of 10 years.

In a desperate attempt to obtain a bond, Carroll, agreed to cooperate with the government regarding his having been tipped off regarding a search of his residence, and other properties, controlled by him on June 30, 1994, over two and a half years before his arrest. Carroll, in exchange for his cooperation and guilty plea, was released on bond pending sentencing, in violation of 18 U.S.C. 3143(a)(2). In December 1993, a former client introduced Petitioner to Carroll. At that time, Carroll owned a ladies' clothing boutique. Petitioner purchased a fur coat from Carroll. On April 12, 1994, Petitioner was given a surprise birthday party at his office.

Carroll and Bledsoe were both in attendance at this party. During Petitioner's trial, Carroll denied being at the parry. Carroll and Petitioner did, however agree that they had seen each other less than 10 times between their initial meeting in December 1993 and June 1994.

In 1994, Bledsoe was the Cooperating Individual System ("CIS") coordinator for the DEA Atlanta field office. She was in charge of maintaining the files and records of individuals who were informants for DEA. In the spring of 1994, Carroll claims that he asked Petitioner to check on the names of the people that were cooperating with DEA against

him. Subsequently, Carroll alleges that Petitioner told him that he did not have to worry about any informants. During his trial, Petitioner denied that Carroll inquired to him about informants. Petitioner also denied ever telling Carroll about the status of any informants.

On June 30, 1994, Carroll called Petitioner's law office at 8:12 a.m., 9:46 a.m. and 12:46 p.m. Petitioner was not in his office and Carroll left three messages. Later that same day, at approximately 2:00 p.m., Carroll claimed that he coincidentally saw Petitioner and Bledsoe at the Crab House restaurant in the Rio Mall in mid-town Atlanta. Carroll alleged that Petitioner introduced Bledsoe to Carroll as, "Regina from DEA," as Carroll and his roommate, Gerard Jefferson, were exiting the restaurant. During the trial, however, Bledsoe presented cash register receipts and canceled checks showing that at 2:09 p.m. and 2:11 p.m., she was in a Revco Pharmacy in Cobb County, Georgia, approximately 20 miles from the Rio Mall, purchasing personal toiletries for a trip she was taking to Houston, Texas the next morning.

Carroll initially told the government, as well as the grand jury, that his associate, Phil Turman, was with him when he met Petitioner and Bledsoe at the Rio Mall on June 30, 1994. Carroll later changed that testimony when he learned from the government that Turman was supposedly on an airplane returning from Houston at the time of this alleged meeting.

After this alleged 2:00 p.m. encounter at the Rio Mall, Carroll claims that Bledsoe recognized Carroll's name and told Petitioner that Carroll was the subject of several warrants from DEA. Petitioner presented evidence that he was in a meeting with his client, Willie Watkins,

at 2:00 p.m. on June 30, 1994. Carroll's mounted mobile telephone records in the vehicle he was driving on June 30, 1994, revealed that between 1:00 p.m. and 2:00 p.m., Carroll made eight telephone calls. Thus, it would have been impossible for Carroll to be inside of a restaurant eating lunch and talking on his mounted telephone in his vehicle at the same time.

Carroll claimed that he went to Petitioner's office on the afternoon of June 30, 1994 and was told by Petitioner that several of his properties were going to be searched by DEA the next day, July 1, 1994. Carroll further claimed that Petitioner met him later that afternoon in front of the Fulton County State Court Building and gave Carroll a copy of the DEA search plans for the next day. Petitioner was allegedly at the courthouse for a scheduled court appearance. Court records reflected that Petitioner had no court appearance on the afternoon of June 30, 1994.

Petitioner's mobile telephone records revealed that he made seven calls between 4:01 p.m. and 4:30 p.m., when he allegedly was supposed to be in court. Petitioner's mobile telephone records revealed that he placed a call to Bledsoe's office telephone at 4:30 p.m., on June 30, 1994. Both Petitioner and Bledsoe denied that they spoke at this time. Petitioner did however leave a message on Bledsoe's voice mail, returning, a call that she made to him on June 29, 1994.

The government contended that Bledsoe retrieved a copy of the DEA search plans from the DEA radio room on the afternoon of June 30, 1994, and gave the plan to Petitioner, who then gave the plan to Carroll.

The indictment alleged a specific time line of the movement of Petitioner and Carroll on June 30, 1994.

Petitioner obtained the flight records from Delta Airlines for Carroll's co-conspirator, Phil Turman, which totally refuted the government's time line. Turman's flight actually arrived in Atlanta at 11:13 a.m. on June 30, 1994. The government had contended that the flight arrived between 2:35 and 4:00 p.m. The actual arrival time from Delta's records made the time line of events in the indictment an impossibility.

The government contended that Carroll and his associates moved vehicles, records, jewelry, photographs, money and other items from his home and his estranged wife's home after Petitioner's alleged tip off. Carroll initially contended that the automobiles were moved to Petitioner's possession on June 30, 1994. During the trial, the government changed its position and asserted that the vehicles were moved to Petitioner's possession the week after the search warrants were executed.

Carroll claimed that the week after the searches, he went to Petitioner's office and gave Petitioner $2,500.00, even though Petitioner did not charge Carroll for the alleged information. Carroll testified that he was just showing his appreciation to Petitioner.

Carroll stated that he met FBI Special Agent Danny Sindall at Petitioner's office a few days after the July 1, 1994 search warrants were executed. Carroll had worked as a FBI informant for Sindall from February 1990 to January 1993. Carroll was paid $3,400.00 for his services. Sindall denied meeting Carroll at Petitioner's office, although Petitioner confirmed Carroll's testimony.

Turman stated that after the search on the morning of July 1, 1994, Carroll was at Turman's home on Windermere Drive when the telephone rang. Carroll answered the

telephone and the call was for Carroll. Carroll had lived at the Windermere Drive home during the time Carroll was a FBI informant. He later subleased the home to Turman. Sindall knew the telephone number to Carroll's home. When Carroll answered the telephone at the Windermere home on the morning of July 1, 1994, Turman testified that Carroll asked, "Why ya'll messing with a nigga?" Petitioner claimed that this was Sindall calling Carroll within hours after the search warrants execution. Sindall said that he did not learn of the Carroll searches until July 1994, when he just happened to run into several DEA agents that told him about the searches.

During Petitioner's trial, Carroll's cousin, Robin Kelley, testified that she heard Carroll, Turman and others discussing the search warrants at Carroll's Panola Mill Drive home the day after the search warrants were executed. Kelley's understanding was that "Dink," a DEA agent at the Windermere Drive search, was the person who tipped off Carroll about the search warrants. The physical description and personal characteristics that Kelly recalled that Carroll, Turman and others articulated about Dink, matched DEA Special Agent Frank Smith. Kelley told this to DEA Special Agent Laurie Schlag in August 1994, when Kelley was cooperating with Schlag regarding Carroll. Kelley's information was repeatedly used by the government in subsequent search and seizure warrants after July 1, 1994. At trial, the government claimed that Kelley had not provided any credible and truthful information to the government regarding Carroll. However, the government's search and seizure warrant affidavit said that Kelley was a reliable confidential informant.

Following the trial, Petitioner was sentenced on Count I, conspiracy to violate 18 U.S.C. Section 2232(b), to 60

months of incarceration, the statutory maximum. The District Court found that the cross referenced guideline of U.S.S.G. 2J1.2(c) applied to Count I. The cross referenced guideline is U.S.S.G. 2X3.1, Accessory After the Fact. The District Court found that the underlying offense that is referred to in 2X3.1 was the Sam Carroll drug conspiracy, the same conspiracy that Petitioner was convicted of in Count III. The District Court found that 5 kilograms of cocaine was attributable to Petitioner on the grounds that: 1) The federal prosecutions of drug cases generally are for five kilograms or more; 2) Petitioner had extensive practice as an attorney with drug cases in federal court; 3) Ms. Bledsoe ran three or four names in the Drug Enforcement Agency CIS System which indicated there were at least three co-conspirators; 4) Carroll's lifestyle, with no visible means of support; 5) Carroll's ownership interest in a nightclub; and 6) Petitioner knew or should have known that Carroll was a drug dealer.

Pursuant to U.S.S.G. 3C1.1, Petitioner was enhanced two points for perjury for his testimony at trial that he did not receive information about the search warrants prior to their execution. There were no other adjustments for Petitioner's role in the offense on Count I.

Following the trial, Petitioner was sentenced to 12 months on Count III, conspiracy to distribute cocaine. The District Court found that no drugs could be attributable to Petitioner.

Using the table in U.S.S.G. 2D1.1(a)(3), the District Court found that Petitioner's base offense level was 14. The District Court also found Petitioner's adjusted offense level was 10. The District Court did not articulate how it arrived at level 10. The Petitioner was subject to 6 - 12 months. The

district court gave Petitioner the high end of the guideline, and sentenced Petitioner to 12 months.

REASONS FOR GRANTING THE WRIT

1. **Was Petitioner's right to due process violated when the District Court found by a preponderance of the evidence that no drugs could be attributable to the Petitioner for sentencing, but allowed the Petitioner's conviction of conspiracy to distribute cocaine to stand?**

The Petitioner was charged in Count III of the indictment with conspiracy to knowingly and intentionally distribute cocaine in violation of 21 U.S.C. Section 846 and 841. At the end of the government's case in chief, Petitioner moved for a judgment of acquittal on the grounds that the government had failed to show that Petitioner, nor any of his alleged co-conspirators, engaged in any kind of drug activities or conspiracies after the date in which the Petitioner was alleged to have joined the conspiracy. The government argued that there was evidence that drug activities had continued past the date that Petitioner joined the conspiracy. Furthermore, the government argued that the Petitioner could be found guilty of conspiracy to distribute cocaine on an aiding and abetting theory pursuant to 18 U.S.C. Section 2, even though the indictment did not allege aiding and abetting. The District Court agreed and denied Petitioner's motion for judgment of acquittal. The District Court denied the Petitioner's post-trial motion for judgment of acquittal on the same grounds.

U.S.S.G. Section 1B1.3 comment (n.2) states in part, "A defendant's relevant conduct does not include the conduct

of members of a conspiracy prior to the defendant joining the conspiracy, even if the defendant knows of that conduct. . . ."

The elements of a conspiracy to distribute cocaine requires 1) an agreement to violate the drug laws; 2) that the defendant knew of the agreement; and 3) that the defendant voluntarily joined the agreement. U.S. v. Hernandez, 896 F. 2d 513, 518 (11th Cir. 1990). The elements of aiding and abetting are that a "person in some way associated himself with the criminal venture, that he wished to bring it about, and that he sought by his actions to make it succeed." U.S. v. Thomas, 676 F. 3d 531 (11th Cir. 1982). Is aiding and abetting an agreement to distribute no drugs (zero quantity of drugs) a violation of 21 U.S.C. Section 846? 21 U.S.C. Section 846 presumes that the agreement will be to conspire to distribute some quantity of drugs.

If the District Court, using a lesser burden than beyond a reasonable doubt (i.e., by a preponderance of the evidence standard), could not find an agreement to distribute any drugs, could a jury have found an agreement to distribute any drugs beyond a reasonable doubt after Petitioner joined the conspiracy?

The District Court found at Petitioner's sentencing that Petitioner joined the Sam Carroll drug conspiracy on June 30, 1994. The District Court found at Sam Carroll's sentencing that Mr. Carroll's drug conspiracy ended in January 1994. Carroll was sentenced after Petitioner's trial, but before Petitioner's sentencing and before the District Court's post-trial order denying Petitioner's motion for judgment of acquittal. Carroll and Petitioner were sentenced by the same District Court.

This Court should grant this Petition to give guidance to the lower courts when the application of the sentencing guidelines conflicts with the jury verdict. The application of the sentencing guidelines should support the jury verdict.

There is a conflict in the circuits as to whether a defendant can aid and abet, pursuant to 18 U.S.C. Section 2, a completed crime.

2nd Circuit Court of Appeals: U.S. v. Freeman, 498 F. 2d 569 (1974). "But the mere fact that a person 'receives, relieves, comforts or assists', one who has been a member of an aborted or completed conspiracy does not make him a participant in the conspiracy or liable for substantive crimes committed during the pendency of the conspiracy."

5th Circuit Court of Appeals: Roberts v. U.S., 416 F. 2d 1216 (1969). "Bookout's act could not have aided or abetted Miller in the passing of the counterfeit currency because that was already an accomplished fact."

6th Circuit Court of Appeals: U.S. v. Ledezma, 26 F. 3d 636, 642 (1994). "Here the possession of the cocaine by the other members of the conspiracy was an accomplished fact when Zajac entered the conspiracy. . . . Zajac did nothing to assist his co-conspirators in the substantive offense relating to the 351 kilograms of cocaine in the van; because his co-conspirators had already completed the crimes."

8th Circuit Court of Appeals: U.S. v. Murry, 588 F. 2d 641 (1978). Murry followed the 5th Circuit's Roberts v. U.S.

11th Circuit Court of Appeals: U.S. v. Perez, 922 F. 2d 782 (1991). Aiding and abetting encompasses activities intended to ensure the success of the underlying substantive crime,

including those that take place after the delivery; or thwarted delivery; of the narcotics.

The 2nd, 5th, 6th, and 8th Circuits conflict with the 11th Circuit. This Court should resolve this conflict among the circuits.

2. **Federal Rules of Criminal Procedure 32(a) provides for sentencing a convicted defendant without unnecessary delay. The government's chief witness against Petitioner, Sam Carroll, was sentenced almost 19 months after he pled guilty. Carroll also pled guilty 12 months before testifying in Petitioner's trial. Was Petitioner's due process right and his right to a fair trial violated when the government's theory of the case and the evidence at Carroll's sentencing materially differed from their trial testimony in Petitioner's case? Federal Rules of Criminal Procedure 32(a) provides for sentencing a convicted defendant without unnecessary delay.**

The District Courts and the government have a routine practice of violating the spirit of Federal Rules of Criminal Procedure 32(a), which states that a defendant should be sentenced without unnecessary delay. The government withholds sentencing for their cooperating defendants for an unreasonable amount of time when these individuals are testifying against other defendants. At trial, defendants, such as Petitioner, are prevented from fully revealing to the jury the reward the cooperating defendants are receiving for their cooperation. The reward is obviously a motivating factor for the testimony, and impeachment evidence against the cooperating witness. This unnecessary delay in sentencing a cooperating defendant, until after he

testifies, denies defendants that are on trial, a fair trial. Cooperating defendants routinely testify that they have no idea if their cooperation will reduce their sentence and if so, to what extent. Additionally, cooperating defendants routinely state that they are just telling the truth as required by their plea agreements.

In the instant case, the government presented only one witness that presented direct evidence that Petitioner was involved in providing tip-off information regarding the July 1, 1994 search warrants to Sam Carroll. Mr. Carroll was that witness. Carroll was arrested on January 29, 1997, for violation of federal drug laws. Carroll was originally detained without bond because the government said he was a danger to the community because of his violent past and that he was facing at least a ten-year sentence. On February 14, 1997, Carroll entered a plea of guilty to conspiracy to distribute cocaine in violation of 21 U.S.C. Section 846. Carroll agreed to cooperate with the government in investigating and prosecuting other criminal matters. Carroll was released on bail on February 14, 1997, after the District Court accepted and found Carroll guilty of violating 21 U.S.C. Section 846. The government consented to Carroll's bond in violation of 18 U.S.C. Section 3143(a)(2). 18 U.S.C. Section 3143(a)(2) required that Carroll be detained without bond.

Carroll's co-conspirator and right hand man was his brother-in-law, Cleveland Davis. Davis also testified at Petitioner's trial. Mr. Davis was arrested in early 1997, and released on bond the same day. Davis pled guilty shortly thereafter to conspiracy to distribute cocaine in violation of 18 U.S.C. Section 846. After the District Court accepted Davis' plea and found him guilty, the District Court, with the government's consent, also released Davis on bond in violation of 18 U.S.C. Section 3143(a)(2).

Carroll was sentenced on September 3, 1998, and was finally detained. Davis was sentenced on March 17, 1999, nearly two years after his arrest and plea. After Davis was sentenced, he again was allowed to remain free on bond in violation of 18 U.S.C. Section 3143(a)(2).

During Petitioner's trial the government's theory was that Carroll was a major cocaine trafficker in the Atlanta area from 1988 to 1996. At Carroll's sentencing, the government and Carroll presented argument to the Court mitigating Carroll's role in the distribution of cocaine that materially contradicted Carroll's testimony at Petitioner's trial. The government also presented evidence at Carroll's sentencing that was clearly Brady material that was not disclosed to Petitioner. The government argued during Carroll's sentencing that Carroll was responsible for 138 kilograms of cocaine over an eight-year period of time. Davis was held responsible at his sentencing for 11 kilograms of cocaine over an eight-year period of time. Hardly, the large cocaine distribution organization that the government contended at Petitioner's trial.

The government contended at Petitioner's trial that these gentlemen lived a lavish lifestyle with no legitimate source of income. It was revealed at Mr. Carroll's sentencing that he had a legitimate source of income. The government filed a motion for downward departure for Carroll that revealed that Carroll breached his plea agreement by participating in drug activities after his plea of guilty. The Carroll sentencing hearing also revealed that Carroll had not been completely honest with the government; that Carroll had refused to cooperate against his drug "cronies"; that facts contained in the June 30, 1994 search warrants that which were admitted into evidence at Petitioner's trial were not true.

These facts were not given to Petitioner prior to his trial in violation of Brady, Giglio and the Jencks Act.

The unnecessary delay in Carroll's and Davis' sentencing prevented Petitioner from revealing to the jury that Carroll's guideline sentence of 30 years was reduced to 12 years. That Davis' 20-year sentence was reduced to 41 months. Both Carroll and Davis testified at Petitioner's trial that they did not have any knowledge of whether they would receive a reduced sentence.

The drastic reductions in the sentences of Carroll and Davis were a tremendous motivation to give false testimony. The jury should have been provided this information. Certainly, it would have assisted jurors in judging the credibility of the testimony of Carroll and Davis. The government knew of the continued drug activities of Mr. Carroll, as well as his legitimate source of income, which the government is now using to pay Carroll's forfeiture. The government also knew to be false the allegations in the search warrant affidavits that stated Carroll was involved in crack cocaine and that he had 80 kilograms of cocaine at one time. These facts only came to light at Carroll's sentencing, when the government argued for a reduced sentence for Carroll as a result of his cooperation. This information was not given to Petitioner to use during his trial.

The routine practice of delaying prosecution witnesses' sentencing until after they have testified provides for fundamentally unfair trials. The government, by withholding sentencing, allows witnesses to testify that they "don't know" what benefits they will receive for their testimony, when in reality, the benefit is a drastic reduction in their sentence. In turn, this reduction provides an incentive for witnesses to provide false testimony to help convict

others, as was the case for Petitioner. The fact-finder should know of this incentive and be allowed to consider it when assessing credibility.

This Court should give the district courts some guidance and put some teeth into Federal Rules of Criminal Procedure 32(a) to stop the unfair practice of withholding the sentencing of the cooperating defendants until after they have testified against others. Petitioner's right to a fair trial, as well as his right to due process, was violated by the government's use of the known perjured testimony during Petitioner's trial.

3. Were Defendant's 5th and 6th Amendment Rights violated when the Court charged and allowed a copy of the jury charges into the jury room that stated that Count III was conspiracy to "knowingly possess cocaine with intent to distribute" rather than the conspiracy to "knowingly and intentionally distribute cocaine" as stated in the indictment?

The District Court never charged the jury with the crime stated in Count III of the indictment. Petitioner was charged in Count III with "conspiracy to knowingly and intentionally to distribute cocaine" in violation of 21 U.S.C. Section 846 and Section 841. The District Court charged the jury that Petitioner was accused in Count III of "conspiracy to knowingly possess cocaine with intent to distribute." The elements of proof are different for these two crimes. The District Court allowed a copy of his erroneous jury charge to go with the jury into the jury room (See Appendix D, App. 26). The jury was never charged on the actual charge in the indictment. 21 U.S.C. Section 841(a)(1) makes it a crime for any person to knowingly or intentionally

to distribute cocaine or possess with intent to distribute cocaine. Petitioner was charged with violating the statute by the distributing cocaine prong.

This Court in Neder v. United States, 527 US 1, 119 S.Ct. 1822, 144 L.Ed 2d 35 (1999), reviewed the line of cases regarding constitutional errors. The issue in Neder was "a jury instruction that omits an element of the offense. . . ." Id. The issue in the instant case is a jury instruction that omits the entire offense. This omission is of the class of structural errors that should be subject to automatic reversal. In Neder Id. 46, this Court citing, Arizona v. Fulminate, 449 US 279, 310, 113 L.Ed. 2d 302, 111 S.Ct. 1246, stated, "Those cases, we have explained, contain a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself."

The instant case was tried within the framework of "distributing cocaine" not "possession of cocaine with intent to distribute." The Petitioner's trial and post-trial motions for judgment of acquittal and new trial focused on the lack of evidence of a conspiracy to distribute cocaine instead of possession of cocaine. In United States v. Olano, 507 US 725, 123 L.Ed 2d 508, 113 S.Ct. 1770 (1993), this Court set out a four-prong test that must be met to correct an error not raised at trial. There must be an (1) error, (2) that is plain, (3) it affects Defendant's substantial rights, and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings. Id.

The District Court's charging of the jury on the wrong crime under the statute meets all four prongs of the Olano test. In the instant case, unlike Johnson v. United States, 520 US 461, 137 L.Ed. 2d 718, 117 S.Ct. 1544 and Neder Id., there was no overwhelming or uncontroverted evidence to

support Petitioner's conviction of conspiracy to distribute cocaine. The District Court found at sentencing that no drugs could be attributed to Petitioner's drug conviction. The government's theory of the case was that Petitioner's violation of Count II (tipping off Carroll of the July 1, 1994 search warrants) caused Petitioner to be guilty of Count III (conspiracy to distribute cocaine). Petitioner was acquitted of the predicate offense under the government's theory. This finding of fact by the District Court and the jury's verdict on Count II, confirms the lack of overwhelming or uncontroverted evidence to support the conviction.

The case at bar is ripe for this Court to decide when the wrong crime is charged to the jury should a harmless analysis standard apply, or a per se reversal standard apply.

4. **Should Defendant's base offense level, when the Defendant is convicted of the underlying crime, be determined by Defendant's relevant conduct, or, the other participant's relevant conduct, when applying U.S.S.G. Section 2J1.2(c)'s cross reference to U.S.S.G. Section 2X3.1, Accessory After the Fact?**

Petitioner was charged in Count I of conspiracy to violate 18 U.S.C. Sections 2232(b) and 371. Petitioner was charged in Count II of a substantive count of violating 18 U.S.C. Section 2232(b) and 2. Both counts involved the Petitioner, an attorney, allegedly tipping off Sam Carroll on June 30, 1994, that DEA agents were going to execute search warrants at several properties associated with Carroll on July 1, 1994. Petitioner and his sole co-defendant, DEA Special Agent Regina Bledsoe, were acquitted of the substantive count of tipping off Carroll (Count II). Petitioner was convicted of the conspiracy count (Count I), but his sole

co-conspirator, DEA Special Agent Bledsoe was acquitted of conspiring with Petitioner.

The appropriate sentencing guideline for conspiracy to violate 18 U.S.C. Section 2232(b) is U.S.S.G. 2X1.1, which requires that the guideline for the substantive offense be used to determine the base offense level for the conspiracy offense. The substantive offense's guideline for the base offense level is U.S.S.G. Section 2J1.2. In the instant case, U.S.S.G. Section 2J1.2(a) and (b) must be compared to Section 2J1.2(c) and the greater level be used to determine the sentence. Sections 2J1.2(b)(1) and (2) are not applicable to the instant case. In comparing Section 2J1.2(a) to Section 2J1.2(c)(1), the Court must determine if the cross-reference of Section 2X3.1 was applicable to the instant case.

Petitioner contends in the instant case that his conspiracy to tip-off Carroll (Count I), but his failure to actually tip off Carroll (Count II), did not involve obstructing the investigation or prosecution of a criminal offense as required by U.S.S.G. Section 2J1.2(c)(1). Even if the cross-reference applies, the 11th Circuit Court of Appeals affirmed an incorrect application of the guideline.

U.S.S.G. Section 1B1.5(a) states that when a cross-reference is required, the entire cross-referenced offense guideline is used. U.S.S.G. Section 2J1.2(c)(1) cross-references to U.S.S.G. Section 2X3.1, Accessory after the fact. U.S.S.G. Section 2X3.1 refers to underlying offense as to which the Defendant was convicted of being an accessory. U.S.S.G. Section 1B1.5(b)(1) states "an instruction to use the offense level from another offense guideline refers to the offense level from the entire offense guideline."

The District Court determined that the underlying offense was the "Sam Carroll drug distribution" conspiracy. Count III of the Petitioner's indictment stated that Petitioner was charged with conspiring with the "Sam Carroll drug distribution organization." The District Court correctly determined that U.S.S.G. Section 2D1.1(a)(3) was the applicable guideline section for Petitioner's Count III conviction. Likewise, U.S.S.G. Section 2D1.1(a)(3) should be used for Count I. If U.S.S.G. Section 2D1.1(a)(3) is applied in Count I to Petitioner, the same results would be determined as in Count III. The District Court applies U.S.S.G. Section 2D1.1(a)(3) to Sam Carroll as opposed to applying U.S.S.G. Section 2D1.1(a)(3) to Petitioner to determine the sentence for Count I. U.S.S.G. Section 2D1.1(a)(3) applied to Petitioner.

In applying U.S.S.G. Section 2D1.1(a)(3), you must determine the quantity of drugs involved in the offense. U.S.S.G. Section 1B1.3 comment (n.2) guides you in what drugs can be attributable to a defendant. The District Court correctly determined that no drugs could be attributable to Petitioner. Therefore, in Count I, Petitioner's adjusted base offense level should have been five (5) if the cross-reference was used [12(2D1.1(c)) minus 6 (2X3.1(a)) plus 2 (3C1.1 comment n.7) minus 3 (2X1.1(b)(2)]. The District Court used a different reasonable foreseeability standard in Count I than in Count III. Several Circuit Courts of Appeals are misapplying the plain meaning of the guidelines when using the cross-reference from U.S.S.G. Section 2J1.2(c) to Section 2X3.1. Some circuits have questioned the Sentencing Commission's intent.

2nd Circuit Court of Appeals: U.S. v. Gay, 44 F. 3d 93 (1994).

"In applying Section 2J1.3(c) cross reference to Section 2X3.1, the court stated, "Gay was not sentenced under Section 2X3.1 because he was found to be an accessory after the fact. He was sentenced under that provision because the guideline applicable to perjury, the crime, of his conviction, directs that he be sentenced instead under Section 2X3.1 if his perjury is found to have been committed "in respect to a criminal offense. . . ." The District Court correctly found that those conditions applied and therefore correctly sentenced Gay under Section 2X3.1, even though Gay had not been found to be an accessory after the fact."

3rd Circuit Court of Appeals: U.S. v. Bertoli, 40 F. 3d 1384, 1406-05 (1994).

After all, use of the cross-reference in this case (and in others like it) enable the court to sentence Bertoli as an accessory after the fact to the crimes for which he was charged and acquitted as a principal. While the "real offense" approach of the guidelines certainly permits the court to consider such facts in computing the sentence, *see* United States v. Ryan, 866 F.2d 604, 609 3d Cir. 1989), such an interpretation is hardly the most obvious reading of the 1989 guideline, particularly in light of the commentary. Moreover, it is at least anomalous to hold – in the absence of explicit direction such as that now provided in the amended commentary—that the defendant could be convicted as both a principal and an accessory after the fact to his or her own crime. As the court reasoned in *Huppert:*

> We agree with the district court's conclusion that a sentencing court 'is permitted to look beyond the four corners of the charge to the underlying conduct.' That practice is clearly permissible under the guidelines. However, under the guidelines, relevant conduct is incorporated into the base offense level *by a prescribed process*. . . . Section 2J1.2(c)(1) provides a specific method by which a court may consider conduct outside the offense of conviction. That method is consistent with our understanding of the law of principals and accessories.

Huppert, 917 F.2d at 511 (citations omitted) (emphasis added).

> In other words, the amended commentary (while certainly not violative of the Constitution or federal law) is in accord neither with the prior case law nor an obvious reading of the guideline."

4th Circuit Court of Appeals: U.S. v. Heater, 63 F.3d 311 (1995).

> "In its 1991 amendment, the Commission recognized that defendants sometimes obstruct justice for the sole purpose of avoiding punishment for an offense that they, themselves, have committed. We interpret the 1991 amendment as expanding Section 2X3.1 cross-referencing to include principals as well as accessories." U.S.S.G.

Section 2X3.1 is no longer an accessory after the fact guideline.

5th Circuit Court of Appeals: U.S. v. Martinez, 106 F.3d 620, 621 (1997).

> "The unambiguous language of Section 2X3.1(n.1) states that the underlying offense means "the offense as to which the defendant is convicted of being an accessory." This note clearly directs the court to the proper base offense level to use if the defendant has been convicted of being an accessory under Section 2X3.1. In this case, however, the guidelines merely borrow the formula in Section 2X3.1 to treat a defendant who has perjured himself in relation to a criminal offense as if he was convicted of being an accessory."

6th Circuit Court of Appeals: U.S. v. Hendrick, 177 F.3d 547, 550-51 (1999).

This case interprets "underlying offense" as used in U.S.S.G. Section 2X2.1 that is similarly used in Section 2X3.1.

> "Nothing in either U.S.S.G. Section 2X2.1 or its commentary suggests that the defendant's base offense level be the same as the principal's base offense level. In fact, the sentencing guidelines make no reference to the principal offender at all—only to the underlying offense. This Court sees a clear distinction between basing an individual's offense level on the underlying offense and basing it on the offense level applied to the principal

offender. . . . The sentencing guideline for aiding and abetting states that the defendant's offense level "is the same level as that for the underlying offense." U.S.S.G. Section 2X2.1 (Emphasis added). The guidelines do not say that the defendant's offense level is the same level as that for the principal offender. There is, therefore, merit to the Defendant-Appellant's emphasis on the use of the article "a" rather than "the" in the commentary to U.S.S.G. Section 2X2.1: "A defendant convicted of aiding and abetting is punishable as a principal." (Emphasis added)"

9th Circuit Court of Appeal: U.S. v. Washington, 66 F.3d 1101, 1104 (1995). citing Bertoli,

". . .application of the cross-reference as the "anomalous" consequence of requiring that a defendant be sentenced as an "Accessory After the Fact" to his own crime. While such a result may be compelled by the amended commentary, it is an unlikely interpretation of the Guidelines' language and is contrary to the pre-1991 commentary."

11th Circuit Court of Appeals: U.S. v. Brenson, 104 F.3d 1267, 1285 (1997).

"The argument concerning the inapplicability of Section 2X3.1 appears to be based on a lack of understanding as to how Section 2X3.1 is applied in these types of cases. This court recently stated that the "language of the cross-referencing provision

> [Section 2J1.2] is mandatory when the offense involves obstructing the investigation or prosecution of a criminal offense without any qualification and without regard to whether defendant or anybody else was convicted of the underlying offense, or whether an offense could be shown to have been committed at all.

The 3rd, 6th and 9th Circuits of the Court of Appeals have interpreted the 2J1.2(c) cross reference to 2X3.1 differently from the 2nd, 4th, 5th and 11th Circuits.

The Circuit Court of Appeals have acknowledged that you do not have to be an accessory after the fact for this guideline to apply even though Section 2X3.1 comment (n.1) states, "Underlying offense" means the offense as to which the defendant is convicted of being an accessory." This Court needs to clarify if the cross reference should be used only in cases where the defendant's real charged offense conviction is an accessory after the fact as opposed to a conviction as a principal, and should the "underlying offense" guideline apply to the defendant's relevant conduct as opposed to others' relevant conduct under the applicable "underlying offense" guideline.

CONCLUSION

For the foregoing reasons, Petitioner prays that this Court grant his Petition for Writ of Certiorari.

Respectfully submitted,
Alvin L. Kendall
Pro Se, Petitioner

APPENDIX

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-9563
Non-Argument Calendar

D.C. Docket No. 97-00405-1-CR-1-JTC

FILED
U.S. COURT OF APPEALS
NOV 23 1999
THOMAS K. KHAN
CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALVIN L. KENDALL,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Georgia

(November 23, 1999)

Before TJOFLAT, BIRCH, and BARKETT, Circuit Judges,

PER CURIAM:

Alvin L. Kendall was convicted in the district court of violating (1) 18 U.S.C. § 371 by conspiring to violate 18 U.S.C. § 2232(b) by giving notice of the pending execution of search warrants by DEA agents on the property of one Sam Carroll, a major cocaine trafficker, Count One, and (2) 21 U.S.C. § 846 by conspiring with the Sam Carroll drug trafficking organization to distribute cocaine, Count Three. The district court sentenced Kendall to prison for sixty months on Count One and twelve months on Count Three, the sentences to run concurrently. Kendall now appeals his convictions and sentences.

Addressing his convictions, Kendall contends that the evidence was insufficient to establish the offenses charged in Cunts One and Three; thus, the district court erred in denying his motion for judgment of acquittal. Regarding Count One, Kendall contends that the Government failed to establish the existence of a conspiracy between him and DEA Agent Bledsoe, a co-defendant who went to trial with Kendall but was acquitted, and/or a conspiracy between him and "other persons." We find his argument meritless. The Government established beyond a reasonable doubt that, based on information Bledsoe provided him, Kendall informed Carroll on June 30, 1994 that the DEA would be executing a search warrant against his property early the following morning. That Bledsoe was acquitted is of no moment: what is important is that the Government's case -- that Bledsoe and Kendall conspired as charged -- was sufficient to go to the jury.

Kendall contends that he should have been granted an acquittal on Count Three because the Government failed to establish that he tipped off Carroll (about the planned DEA

search) or that he aided and abetted Carroll's drug trafficking organization. As with Count One, Kendall's guilt was well established.

Kendall contends, alternatively, that the district court should have granted him a new trail on grounds that the court erred in instructing the jury on the elements of the Count Three offense and the theory of aiding and abetting,; the Government used perjured testimony to obtain his convictions' and the Government failed to disclose discoverable materials as required by Brady and Giglio and the Jenks Act. We find no merit in Kendall's contentions; the court acted well within its discretion in denying Kendall a new trial.

Turning to his sentence, Kendall contends that the district court erred

1) by applying U.S.S.G. § 2J1.2(c)(1) and its cross-reference to U.S.S.G. § 2X3.1 to calculate the base offense level for Count One;

2) by attributing five to fifteen kilograms of cocaine to him for purposes of calculating that base offense level;

3) by failing properly to analyze whether he was entitled to a minimal-role reduction of his Count One offense level pursuant to U.S.S.G. § 3B1.2(a);

4) by refusing to adjust the Count One offense level downward by three levels by reason of his participation in a conspiracy; and

5) by enhancing the offense level of Counts One and Three for obstruction of justice because he had committed perjury at trial (according to Kendall, there was no evidence of such perjury).

Our examination of the sentencing record, including the presentence report, indicates that the district court did not err as Kendall contends. On the contrary, Kendall received a fair sentencing hearing; the court carefully considered his objections and properly rejected them.

The judgement of the district court is, accordingly, AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-9563
FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FEB 18 2000
THOMAS K. KAHN,
CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALVIN L. KENDALL,

Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19 __, ____F.2d_____).

Before: TJOFLAT, BIRCH and BARKETT, Circuit Judges.

PER CURIAM:
The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petitions(s) for Rehearing En banc are DENIED.

ENTERED FOR THE COURT
/s/ Gerald B. TJOFLAT
UNITED STATES CIRCUIT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Case No. 1:97-CR-405-JTC

UNITED STATES OF AMERICA

Versus

ALVIN L. KENDALL

George O. Lawson, Jr.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant was found guilty by a jury on Counts 1 and 3 of the Indictment. Accordingly, the defendant is adjudged guilty of such counts, involving the following offense:

Title & Section	Nature of Offense	Count No.
18 U.S.C. § 2232(b) and 18 U.S.C. § 371	Conspiracy to Give Notice of Impending Search and Seizure Warrants	1
21 U.S.C. § 846	Conspiracy to Distribute Cocaine	3

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay the special assessment of $200.00 which shall be due immediately.
IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within thirty days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No:	254-76-1 400
Date of Imposition of Sentence	December 3, 1998
Defendant's Date of Birth:	April 12, 1960
Defendant's Mailing Address:	Pretrial Detention Center Atlanta, Georgia

Dated this 7 December, 1998.

/s/Jack T. Camp
JACK T. CAMP
UNITED STATE DISTRICT JUDGE

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 60 months. This term consists of 60 months on Count 1 and 12 months on Count 3 to run concurrently.

The Court makes the following recommendation(s) to the Bureau of Prisons: The Court strongly recommends that the Atlanta Prison Camp be designated as the place of confinement.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at, ___ with a certified copy of this judgment._____

UNITED STATES MARSHAL

By:_____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment. the defendant shall be on supervised release for a term of three (3) years.

While on supervised release, the defendant shall not commit another federal, state or local crime, shall not illegally possess a controlled substance-, shall comply with the standard conditions that have been adopted by this court (set forth below)-, and shall comply with the following additional conditions:

1. If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

2. If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pays any such fine, assessments, costs and restitution that remain unpaid at the commencement of the term of supervised release.

3. The defendant shall not own, possess or have under his control any firearm, destructive device or other dangerous weapon.

4. The defendant shall make regular payments toward the unpaid balance of the fine imposed in this case on

terms and conditions specified by the probation officer, but in no event less than $250 per month.

5. The defendant shall make a full and complete disclosure of his finances and submit to an audit of his financial documents, at the request of the probation officer. Further, the defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer and unless he is in compliance with the installment payment schedule.

6. The defendant shall submit to random drug testing as directed by the probation officer.

7. The defendant shall submit to any reasonable search of his person, property, residence and/or vehicle, at the request of the probation officer.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1. The defendant shall not leave the judicial district without the permission of the court or probation officer.
2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
4. The defendant shall support his or her dependents and meet other family responsibilities.
5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
6. The defendant shall notify the probation officer within 72 hours of any change in residence or employment.
7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as directed by the probation officer to determine the use of any controlled substance.

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
11. The defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer.
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINE

The defendant shall pay a fine of $12,500.00. Payment of the fine shall commence during the defendant's incarceration in accordance with the Bureau of Prison's Inmate Financial Responsibility Program.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA

V.

1:97-CR-405

ALVIN L. KENDALL and
REGINA BLEDSOE

COURT'S INSTRUCTIONS
TO THE JURY

Members of the Jury:

It is now my duty to instruct you on the rules of law that you must follow and apply in deciding this case. When I have finished the attorneys will present their closing arguments. You will go to the jury room and begin your discussions -- what we call your deliberations.

It will be your duty to decide whether the Government has proved beyond a reasonable doubt the specific facts necessary to find the Defendant guilty of the crime charged in the indictment.

You must make your decision only on the basis of the testimony and other evidence presented here during the trial; and you must not be influenced in any way by either

sympathy or prejudice for or against the Defendant or the Government.

You must also follow the law as I explain it to you whether you agree with that law or not; and you must follow all of my instructions as a whole. You may not single out, or disregard, any of the Court's instructions on the law.

The indictment or formal charge against any Defendant is not evidence of guilt. Indeed, the Defendant is presumed by the law to be innocent. The law does not require a Defendant to prove his innocence or produce any evidence at all. The Government has the burden of proving a Defendant guilty beyond a reasonable doubt, and if it fails to do so you must find the Defendant not guilty.

DEFINITION OF REASONABLE DOUBT

Thus, while the Government's burden of proof is a strict or heavy burden, it is not necessary that the Defendant's guilt be proved beyond all possible doubt. It is only required that the Government's proof exclude any "reasonable doubt" concerning the Defendant's guilt.

A "reasonable doubt" is a real doubt, based upon reason and common sense after careful and impartial consideration of all the evidence in the case.

Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs. If you are convinced that the Defendant

has been proved guilty beyond a reasonable doubt, say so. If you are not convinced, say so.

EVIDENCE

As stated earlier you must consider only the evidence that I have admitted in the case. The term "evidence" includes the testimony of the witness and the exhibits admitted in the record. Remember that anything the lawyers say is not evidence in the case. It is your own recollection and interpretation of the evidence that controls. What the lawyers say is not binding upon you. Also, you should not assume from anything I may have said that I have any opinion concerning any of the issues in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own decision concerning the facts.

In considering the evidence you may make deductions and reach conclusions which reason and common sense lead you to make; and you should not be concerned about whether the evidence is direct or circumstantial. "Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. 'Circumstantial evidence" is proof of a chain of facts and circumstances indicating that the Defendant is either guilty or not guilty. The law makes no distinction between the weight you may give to either direct or circumstantial evidence.

CREDIBILITY OF WITNESS

Now, in saying that you must consider all of the evidence, I do not mean that you must accept all of the evidence as true or accurate. You should decide whether you

believe what each witness had to say, and how important that testimony was. In making that decision you may believe or disbelieve any witness, in whole or in part. Also, the number of witnesses testifying concerning any particular dispute is not controlling. You may decide that the testimony of a smaller number of witness concerning any fact in dispute more believable than the testimony of a larger number of witnesses to the contrary.

In deciding wither you believe or do not believe any witness I suggest that you ask yourself a few questions: Did the person impress you as one who was telling the truth? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to observe accurately the things he or she testified about? Did the witness appear to understand the questions clearly and answer them directly? Did the witness's testimony differ from the testimony of other witnesses?

You should also ask yourself whether there was evidence tending to prove that the witness testified falsely concerning some important fact; or, whether there was evidence that at some other time the witness said or did something, or failed to say or do something, which was different from the testimony he or she gave before you during the trial.

The fact that a witness has been convicted of a felony offense, or a crime involving dishonesty or false statement, is

another factor you may consider in deciding whether you believe his testimony.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether that misstatement was simply an innocent lapse of memory or an intentional falsehood; and that may depend on whether it has to do with an important fact or with only an unimportant detail.

A Defendant has a right not to testify. If a Defendant does testify, however, you should decide in the same way as that of any other witness whether you believe the Defendant's testimony.

There may also be evidence tending to show that a witness has a bad reputation for truthfulness in the community where the witness resides, or has recently resided; or that others have an unfavorable opinion of the truthfulness of the witness.

You may consider those mattes also in deciding whether to believe or disbelieve such a witness.

When knowledge of a technical subject matter might be helpful to the jury, a person having special training or experience in that technical field - - one who is called an

expert witness - - is permitted to state his or her opinion concerning those technical matters.

Merely because an expert witness has expressed an opinion, however, does not mean that you must accept that opinion. The same as with any other witness, it is up to you to decide whether to rely upon it.

The testimony of some witnesses must be considered with more caution than the testimony of other witnesses.

For example, a paid informer, or a witness who has been promised that he or she will not be charged or prosecuted, or a witness who hopes to gain more favorable treatment in his or her own case, may have a reason to make a false statement because the witness wants to strike a good bargain with the Government. So, while a witness of that kind may be entirely truthful when testifying, you should consider that testimony with more caution than the testimony of other witnesses.

Further, in this case the Government called as witnesses persons named as co-defendants in a related indictment, with whom the Government has entered into plea agreements providing for the possibility of a lesser sentence than the witnesses would otherwise be exposed to. Such plea bargaining, as it's called, has been approved as lawful and proper, and is expressly provided for in the rules of this Court. However, witnesses who hope to gain more favorable treatment may have a reason to make a false statement because the witnesses want to strike a good bargain with the Government. So, while witnesses of that kind may be entirely

truth when testifying, you should consider such testimony with more caution than the testimony of other witnesses.

And of course, the fact that a witness has pled guilty to the crime charged in the indictment is not evidence, in and of itself, of the guilt of any other person.

NOTETAKING

In the case you have been permitted to take notes during the course of the trial, and most of you -- perhaps all of you -- have taken advantage of that opportunity and have made notes from time to time.

You will have your notes available to you during your deliberations, but you should make use of them only as an aid to your memory. In other words, you should not give your notes any precedence over your independent recollection of the evidence or the lack of evidence; and neither should you be unduly influenced by the notes of other jurors.

I emphasize that notes are not entitled to any greater weight than the memory or impression of each juror as to what the testimony may have been.

INTRODUCTION TO OFFENSE INSTRUCTIONS

In this case, as you know, the indictment charges three separate offenses called "counts." I will not read it to you at length because you will be given a copy of the indictment for study during your deliberations.

In summary, Counts One and Three charge conspiracy

offenses. Count One charges that the Defendants knowingly and willfully conspired together to give notice of pending searches and seizures to Sam Carroll, the alleged conspiracy being a violation of Title 18, United States Code, Section 371. Count Three charges that the Defendants knowingly and willfully conspired together to distribute cocaine, this alleged conspiracy being a violation of Title 21, United States Code, Section 846.

Count Two charges the commission of a so-called substantive offense, namely that the Defendants, having knowledge that federal agents had been authorized to make searches and seizures of the Sam Carroll drug distribution organization, gave notice of the impending searches and seizures to Sam Carroll in violation of Title 18, United States Code, Section 2232 (b).

As to Count One, you will note that the Defendants are not charged in that Count with violating Title 18, United States Code, Section 2232 (b), which would be violated by accomplishment of the alleged conspiracy; rather, they are charged with having conspired to do so, in violation of Title 18, United States Code, Section 371.

Also, as to Count Three, you will note that the Defendants are not charged in that Count with violating Title 21, United States Code, Section 1841, to-wit: to knowingly and intentionally distribute cocaine; rather, they are charged with having conspired to do so, violation of Title 21, United States Code, Section 846.

Count I

Title 18, United States Code, Section 371, makes it a separate Federal crime or offense for anyone to conspire or agree with someone else to do something which, if actually carried out, would amount to another Federal crime or offense. So, under this law, a "conspiracy" is an agreement or a kind of " partnership" in criminal purposes in which each member becomes the agent or partner of every other member.

In order to establish a conspiracy offense it is not necessary for the Government to prove that all of the people named in the indictment were members of the scheme; or that those who were members had entered into any formal type of agreement; or that the members had planned together all of the details of the scheme or the "overt acts" that the indictment charges would be carried out in an effort to commit the intended crime.

Also, because the essence of a conspiracy offense is the making of the agreement itself (followed by the commission of any overt act), it is not necessary for the Government to prove that the conspirators actually succeeded in accomplishing their unlawful plan.

What the evidence in the case must show beyond a reasonable doubt is:

First: That two or more persons, in some way or manners, came to the mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment;

Second: That the Defendant, knowing the unlawful purpose of the plan, willfully joined in it;

Third: That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the methods (or "overt acts") described in the indictment; and

Fourth: That such "overt act" was knowingly committed at or about the time alleged in an effort to carry out or accomplish some object of the conspiracy.

An "overt act" is any transaction or event, even one which may be entirely innocent when considered alone, but which is knowingly committed by a conspirator in an effort to accomplish some object of the conspiracy.

A person may become a member of a conspiracy without knowing all of the details of the unlawful scheme, and without knowing who all of the other members are. So, if a Defendant has a general understanding of the unlawful purpose of the plan and knowingly and willfully joins in that plan on one occasion, that is sufficient to convict that Defendant for conspiracy event though the Defendant did not participate before, and even though the Defendant played only a minor part.

Of course, mere presence at the scene of a transaction or event, or the mere fact that certain persons may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some purposes of one, does not thereby become a conspirator.

COUNT II

Title 18, United States Code, Section 2232(b) provides:

Whoever, having knowledge that nay person authorized to make searches and seizures has been authorized or is otherwise likely to make a search or seizure, in order to prevent the authorized seizing or securing of any person, goods, wares, merchandise or other property, gives notice or attempts to give notice of the possible search or seizure to any person shall . . . have committed an offense against the Untied States.

The defendants can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

(1) First, that the defendants had knowledge that persons authorized to make searches and seizures were likely to make searches and seizures at the properties specified in the indictment;

(2) Second, that the defendant gave notice of the possible searches and seizures to another person; and

(3) Third, that defendants gave such notice in order to prevent the authorized seizing or securing of any person, goods, wares, merchandise, or other property, as specified in the indictment.

COUNT III

Title 21, Untied States Code, Section 846, make it a separate Federal crime or offense for anyone to conspire or

agree with someone else to do something which, if actually carried out, would be a violation of Section 841(a)(1). Section 841(a)(1) makes it a crime for anyone to knowingly possess cocaine with intent to distribute it (Emphasis added).

So, under the law, a "conspiracy" is an agreement or a kind of "partnership in criminal purposes" in which each member becomes the agent or partner of every other member.

In order to establish a conspiracy offense, it is not necessary for the Government to prove that all of the people named in the indictment were members of the scheme, or that those who were members had entered into any formal type of agreement. Also, because the essence of a conspiracy offense is the making of the scheme itself, it is not necessary for the Government to prove that the conspirators actually succeed in accomplishing their unlawful plan.

With regard to the conspiracy charged in Count III, what the evidence in the case must show beyond a reasonable doubt is:

First: That two or more or persons in some way or manners, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment; and

Second: That the Defendant, knowing the unlawful purpose of the plan, willfully joined in it.

A person may become a member of a conspiracy without full knowledge of all of the details of the unlawful

scheme or the names and identities of all of the other alleged conspirators. So, if a Defendant has a general understanding of the unlawful purpose of the plan and knowingly and willfully joins in that plan on one occasion, that is sufficient to convict the Defendant for conspiracy even though the Defendant did not participate before and even though the Defendant played only a minor part.

Of course, mere presence at the scene of a transaction or event, or the mere fact that certain persons may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some purpose of one, does not thereby become a conspirator.

You are instructed that a Defendant may be found guilty of conspiracy even if the Defendant did not join the conspiracy until after its inception, and even if the Defendant played only a minor role in the whole scheme. Further, you are instructed that once the Government has proved beyond a reasonable doubt that the conspiracy existed and that a Defendant knowingly became a member of the conspiracy then that Defendant is bound by all acts of other co-conspirators that occurred during the conspiracy, and in furtherance of the conspiracy, even if those acts were unknown to the Defendant, if they ware reasonably foreseeable by the Defendant.

The guilt of a defendant in a criminal case may be proved without evidence that the Defendant personally did every act involved in the commission of the crime charged.

The law recognizes that, ordinarily, anything a person can do for one's self may also be accomplished through direction of another person as an agent, or by acting together with, or under the direction of, another person or persons in a joint effort.

So, if the acts or conduct of an agent, employee or other associate of the Defendant are willfully directed or authorized by the Defendant, or if the Defendant aids and abets another person by willfully joining together with that person in the commission of a crime, then the law holds the Defendant responsible for the conduct of that other person just as though the Defendant had personally engaged in such conduct.

However, before any Defendant can be held criminally responsible for the conduct of others it is necessary that the Defendant willfully associate in some way with the crime, and willfully participate in it. Mere presence at the scene of a crime and even knowledge that a crime is being committed are not sufficient to establish that a Defendant either directed or aided and abetted the crime. You must find beyond a reasonable doubt that the Defendant was a willful participant and not merely a knowing spectator.

CHARACTER EVIDENCE

The Defendant has offered evidence of the Defendant's traits of character, and such evidence may give rise to a reasonable doubt.

Where a Defendant has offered testimony that the Defendant is an honest and law-abiding citizen, the jury

should consider that testimony, along with all the other evidence, in deciding whether the Government has proved beyond a reasonable doubt that the Defendant committed the crime charged.

ALIBI

Evidence has been introduced tending to establish an alibi - - that the Defendant was not present at the time when, or at the place where, the Defendant is alleged to have committed the offense charged in the indictment.

It is, of course, the Government's burden to establish beyond a reasonable doubt each of the essential elements of the offense, including the involvement of the Defendant; and if, after consideration of the all the evidence in the case, you have a reasonable doubt as to whether the Defendant was present at the time and place as alleged in the indictment, you must find the Defendant not guilty.

ON OR ABOUT -- KNOWINGLY -- WILLFULLY

You will note that the indictment charges that the offense was committed "on or about" a certain date. The Government does not have to prove with certainty the exact date of the alleged offense. It is sufficient if the Government proves beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

The word "knowingly," as that term has been used from time to time in these instructions, means that the act was done voluntarily and intentionally and not because of mistake or accident.

The word "willfully," as that term has been used from time to time in these instructions, means that the act was

committed voluntarily and purposely, with the specific intent to do something the law forbids; that is with bad purpose either to disobey or disregard the law.

DELIBERATIONS

A separate crime or offense is charged against one or more of the Defendants in each count of the indictment. Each charge, and the evidence pertaining to it, should be considered separately. Also, the case of each Defendant should be considered separately and individually. The fact that you may find any one or more of the Defendants guilty or not guilty of any of the offenses charged should not affect your verdict as to any other offense or any other Defendant.

I caution you, members of the Jury, that you are here to determine from the evidence in this case whether the Defendant is guilty or not guilty. Each Defendant is on trial only for the specific offenses alleged in the indictment.

Also, the question of punishment should never be considered by the jury in any way in deciding the case. If the Defendant is convicted the matter of punishments if for the Judge alone to determine later.

Any verdict you reach in the jury room, whether guilty or not guilty, must be unanimous. In other words, to return a verdict you must all agree. Your deliberations will be secret; you will never have to explain your verdict to anyone.

It is your duty as jurors to discuss the case with one another in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after full consideration of the evidence with the other members of

the jury. While you are discussing the case do not hesitate to reexamine your own opinion and change your mind if you become convinced that you were wrong. But do not give up your honest beliefs solely because the others think differently or merely to get the case over with.

Remember, that in a very real way you are judges - - judges of the facts. Your only interest is to seek the truth from the evidence in the case.

When you go the jury room you should first select one of your members to act as your foreperson. The foreperson will preside over your deliberations and will speak for you here in court.

A form of verdict has been prepared for your convenience.

You will take the verdict form to the jury room and when you have reached unanimous agreement you will have your foreperson fill in the verdict form, date and sign it, and then return to the courtroom.

If you should desire to communicate with me at any time, please write own your message or question and pass the note to the marshal who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally I caution you, however, with regard to any message or question you might send, that you should not tell me your numerical division at the time.

APPENDIX E

STATUTES AND CONSTITUTIONAL PROVISIONS

5th Amendment to the United States Constitution

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

6th Amendment to the United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Federal Rules of Criminal Procedure 32(a)

(a) **In General; Time for Sentencing.** When a presentence investigation and report are made under subdivision (b)(1), sentence should be

imposed without unnecessary delay following completion of the process prescribed by subdivision (b)(6). The time limits prescribed in subdivision (b)(6) may be either shortened or lengthened for good cause.

Title 18 United States Code Section 2—Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Title 18 United States Code Section 371—Conspiracy to Commit Offense or to Defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such

conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 18 United States Code Section 2232(b)—Notice of Search

Whoever, having knowledge that any person authorized to make searches and seizures has been authorized or is otherwise likely to make a search or seizure, in order to prevent the authorized seizing or securing of any person, goods, wares, merchandise or other property, gives notice or attempts to give notice of the possible search or seizure to any person shall be fined under this title or imprisoned not more than five years, or both.

Title 18 United States Code Section 3143(a)(2)—Release or Detention of a Defendant Pending Sentence or Appeal

(a) **Release or detention pending sentence.**

(2) The judicial officer shall order that a person who has been found guilty of an offense in a case described in subparagraph (A), (B), or (C) of subsection (f)(1) of section 3142 and is awaiting imposition or execution of sentence be detained unless—

(A)(i) the judicial officer finds there is a substantial likelihood that a motion for acquittal or new trial will be granted; or

(ii) an attorney for the Government has recommended that no

sentence of imprisonment be imposed on the person and;

(B) the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to any other person or the community.

Title 18 United States Code Section 3231—District Courts

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

Title 18 United States Code Section 3742(a)(1)—Review of Sentence

(a) **Appeal by a defendant.** A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law.

Title 21 United States Code Section 841(a)(1)—Prohibited Acts

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

Title 21 United States Code Section 846—Attempt and Conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Title 28 United States Code Section 1291—Final Decisions of District Courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

United States Sentencing Guidelines Section 1B1.3 — Comment (n.2)

2. *"jointly undertaken criminal activity" is a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy.*

In the case of a jointly undertaken criminal activity, subsection (a)(1)(B) provides that a defendant is accountable for the conduct (acts and omissions) of others that was both:

(i) in furtherance of the jointly undertaken criminal activity; and

(ii) reasonably foreseeable in connection with that criminal activity.

Because a count may be worded broadly and include the conduct of many participants over a period of time, the scope of the criminal activity jointly undertaken by the defendant (the "jointly undertaken criminal activity") is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant. In order to determine the defendant's accountability for the conduct of others under subsection (a)(1)(B), the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant's agreement). The conduct of

others that was both in furtherance of, and reasonably foreseeable in connection with, the criminal activity jointly undertaken by the defendant is relevant conduct under this provision. The conduct of others that was not in furtherance of the criminal activity jointly undertaken by the defendant, or was not reasonably foreseeable in connection with that criminal activity, is not relevant conduct under this provision.

In determining the scope of the criminal activity that the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant's agreement), the court may consider any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others.

Note that the criminal activity that the defendant agreed to jointly undertake, and the reasonably foreseeable conduct of others in furtherance of that criminal activity, are not necessarily identical. For example, two defendants agreed to commit a robbery and, during the course of that robbery, the first defendant assaults and injures a victim. The second defendant is accountable for the assault and injury to the victim (even if the second defendant had not agreed to

the assault and had cautioned the first defendant to be careful not to hurt anyone) because the assaultive conduct was in furtherance of the jointly undertaken criminal activity (the robbery) and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).

With respect to offenses involving contraband (including controlled substances), the defendant is accountable for all quantities of contraband with which he was directly involved and, in the case of a jointly undertaken criminal activity, all reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook.

The requirement of reasonable foreseeability applies only in respect to the conduct (i.e., acts and omissions) of others under subsection (a)(1)(B). It does not apply to conduct that the defendant personally undertakes, aids, abets, counsel, commands, induces, procures, or willfully causes: such conduct is addressed under subsection (a)(1)(A).

A defendant's relevant conduct does not include the conduct of members of a conspiracy prior to the defendant joining the conspiracy, even if the defendant knows of that conduct (e.g., in the case of a defendant

who joins an ongoing drug distribution conspiracy knowing that it had been selling two kilograms of cocaine per week, the cocaine sold prior to the defendant joining the conspiracy is not included as relevant conduct in determining the defendant's offense level). The Commission does not foreclose the possibility that there may be some unusual set of circumstances in which the exclusion of such conduct may not adequately reflect the defendant's culpability; in such a case, an upward departure may be warranted.

United States Sentencing Guidelines Section 1B1.5—Interpretation of References to Other Offense Guidelines

(a) *cross reference (an instruction to apply another offense guideline) refers to the entire offense guideline (i.e., the base offense level, specific offense characteristics, cross references, and special instructions).*

(b) *(1) An instruction to use the offense level from another offense guideline refers to the offense level from the entire offense guideline (i.e., the base offense level, specific offense characteristics, cross references, and special instructions), except as provided in subdivision (2) below.*

(2) An instruction to use a particular subsection or table from another offense guideline refers only to the

particular subsection or table referenced, and not to the entire offense guideline.

(c) *If the offense level is determined by a reference to another guideline under subsection (a) or (b)(1) above, the adjustments in Chapter Three (Adjustments) also are determined in respect to the referenced offense guideline, except as otherwise expressly provided.*

(d) *A reference to another guideline under subsection (a) or (b)(1) above may direct that it be applied only if it results in the greater offense level. In such case, the greater offense level means the greater Chapter Two offense level, except as otherwise expressly provided.*

United States Sentencing Guidelines Section 1B1.3—Comment (n.10)

10. In the case of solicitation, misprison, or accessory after the fact, the conduct for which the defendant is accountable includes all conduct relevant to determining the offense level for the underlying offense that was known, or reasonably should have been known by the defendant.

United States Sentencing Guidelines Section 2D1.1(a)(3)—Unlawful Manufacturing, Importing, Exporting, or Trafficking. . .

(a) *Base Offense Level (Apply the greatest):*

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c) below.

United States Sentencing Guidelines Section 2J1.2—Obstruction of Justice

(a) *Base Offense Level: 12*

(b) *Specific Offense Characteristics*

(1) *If the offense involved causing or threatening to cause physical injury to a person, or property damage, in order to obstruct the administration of justice, increase by 8 levels.*

(2) *If the offense resulted in substantial interference with the administration of justice, increase by 3 levels.*

(c) *Cross Reference*

(1) If the offense involved obstructing the investigation or prosecution of a criminal offense, apply § 2X3.1 (Accessory After the Fact) in respect to that criminal offense, if the resulting offense level is greater than that determined above.

United States Sentencing Guidelines Section 2X1.1—Attempt, Solicitation or Conspiracy

(a) *Base Offense Level: The base offense level from the guideline for the substantive offense, plus any adjustment from such guideline for any intended offense conduct that can be established with reasonable certainty.*

(b) *Specific Offense Characteristics*

(1) *If an attempt, decrease by 3 levels, unless the defendant completed all the acts the defendant believed necessary for successful completion of the substantive offense or the circumstances demonstrate that the defendant was about to complete all such acts but for apprehension or interruption by some similar event beyond the defendant's control.*

(2) *If a conspiracy, decrease by 3 levels, unless the defendant or a co-conspirator completed all the acts the conspirators believed necessary on their part for the successful completion of the substantive offense or the circumstances demonstrate that the conspirators were about to complete all such acts but for apprehension or interruption by some similar event beyond their control.*

(3) *(A) If a solicitation, decrease by 3 levels unless the person solicited to commit or aid the substantive offense completed all the acts he believed necessary for successful completion of the substantive offense or the circumstances demonstrate that the person was about to complete all such acts but for apprehension or interruption by some similar*

event beyond such person's control.

(B) *If the statute treats solicitation of the substantive offense identically with the substantive offense, do not apply subdivision*

(A) above; i.e., the offense level for solicitation is the same as that for the substantive offense.

(c) *Cross Reference*

(1) When an attempt, solicitation, or conspiracy is expressly covered by another offense guideline section, apply that guideline section.

United States Sentencing Guidelines Section 2X2.1—Aiding and Abetting

The offense level is the same level as that for the underlying offense.

Commentary

Statutory Provision: 18 U.S.C. § 2.

Application Note:

1. Underlying offense" means the offense the defendant is convicted of aiding or abetting.

Background: A defendant convicted of aiding and abetting is punishable as a principal.

United States Sentencing Guidelines Section 2X3.1—Accessory After the Fact

(a) *Base Offense Level: 6 levels lower than the offense level for the underlying offense, but in no event less than 4, or more than 30. Provided, that where the conduct is limited to harboring a fugitive, the offense level shall not be more than level 20.*

Application Notes:

1. *Underlying offense " means the offense as to which the defendant is convicted of being an accessory. Apply the base offense level plus any applicable specific offense characteristics that were known, or reasonably should have been known, by the defendant"; see Application Note 10 of the Commentary to Section 1B1.3 (Relevant Conduct).*

United States Sentencing Guidelines Section 3C1.1—Comment (n.7) (currently n.8)

If the defendant is convicted both of an obstruction offense (e.g., 18 U.S.C. § 3146 (Penalty for failure to appear); 18 U.S.C. § 1621 (Perjury generally)) and an underlying offense (the offense with respect to which the obstructive conduct occurred), the count for the obstruction offense will be grouped with the count for the underlying offense under subsection (c) of § 3D1.2 (Groups of Closely Related Counts). The offense level for that group of closely related counts will be the offense level for the underlying offense increased by the 2-level adjustment specified by this section, or the offense level for the obstruction offense, whichever is greater.